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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DONALD C. FELTON AND
MARIANNE V. FELTON, Petitioners

v.

COMMISSIONER OF INTERNAL
REVENUE, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether in determining the tax home under Section 162, I.R.C., of a wife, the wife should be treated the same as an unmarried person: thereby ignoring factors such as the employment situation of her husband; their ownership for thirteen (13) years of a residence in the city where her husband is employed; that it is feasible for her to perform most (but not all) of her duties to her employer in the city of the marital residence; that it would cost five times as much for her to live in an apartment in the other city as to rent transient facilities for the sixty (60) nights each year that she had to stay overnight in the other city; that she could not

obtain employment in her field of expertise in the vicinity of the marital residence; and that her husband could not join her in a move of the marital residence unless he resigned his position, thereby suffering a dimunition of retirement benefits.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The petitioners Donald C. Felton and Marianne V. Felton respectfully pray that a writ of certiorari issue to review the judgment and unpublished order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 21, 1983.

OPINIONS BELOW

The unpublished order of the Court of Appeals appears as Appendix "A" hereto. The Memorandum findings of fact and Opinion of the United States Tax Court appears as Appendix "B" hereto. The order denying the Petition for Rehearing appears as Appendix "C" nereto.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was entered on October 21, 1983. A timely Petition for Rehearing with Suggestion for Rehearing in banc was denied on November 22, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. ¶ 1254(1).

STATUTORY PROVISIONS INVOLVED

I.R.S. § 162. Trade or business expenses

(a) In general. - There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including -

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession for purposes of the trade or

business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

STATEMENT OF THE CASE

Appellant Marianne V. Felton (her Ph.D. in Economics almost completed) in 1978, could not find employment as an economist in or within commuting

distance of Bloomington, Indiana, where she and her husband owned a residence in which they had lived with their children for about 13 years. She accepted employment in 1978 in New Albany, Indiana (about 100 miles away), at Indiana University Southeast (a regional campus), only after her employer-to-be agreed her classes would be bunched so she would need stay overnight in New Albany only two nights each week, so that she could return to Bloomington where most of her work (class preparation, research and reading to keep current) was done and where she could use the superior library and computer facilities at the main campus of Indiana University. She did not teach in the summer, and worked many more hours in Bloomington than in New Albany.

Her husband had held a staff position at the main campus of Indiana University in Bloomington, Indiana, since 1965, and if he resigned in 1978 to move to New Albany before completing 15 years of service he would have suffered a diminution in retirement benefits. During the period in controversy (August 15, 1978 to December 31, 1978), Mrs. Felton slept as a transient in New Albany for 30 nights (2 nights for each of 15 weeks) and the rest of the time she lived at the established marital residence in Bloomington, Indiana.

In New Albany she paid five dollars ($5.00) a night to a widow for sleeping privileges in one of the bedrooms in the widow's residence. It would have cost at least five times as much for Mrs. Felton to have rented, furnished and maintained an apartment in New Albany.

The petitioners deducted the traveling expenses to New Albany for the period August 15 through December 31, 1978 on their federal income tax return. The Commissioner disallowed the deduction of these expenses, and the petitioners sought a redetermination of that disallowance in a petition to the U.S. Tax Court.

The U.S. Tax Court found that the petitioners' tax home was in New Albany during the period August 15, 1978 through December 31, 1978 and that as a result the traveling expenses for that period could not be deducted. The Court of Appeals for the Seventh Circuit affirmed in an unpublished Order. The petitioners are placed at some disadvantage in stating the question presented by the fact that neither the Tax Court nor the Seventh Circuit answered their arguments. The Tax Court

did in its footnote 6 say "While petitioner's [sic] point [problem of families with spouses employed in different cities] perhaps is appealing sociologically, it has no basis in law." In the Appendix "D" there are a few excerpts from arguments made in briefs filed in this case to show that the question presented to this Court was presented to the Tax Court and the Seventh Circuit.

REASONS FOR GRANTING REVIEW

I. THE DECISION IN THIS CASE OF THE SEVENTH CIRCUIT IS IN CONFLICT WITH A DECISION OF THE SECOND CIRCUIT.

The unpublished order of the Seventh Circuit acknowledged this conflict. At page 4 the order states, "For purposes of the travel expense deduction, a taxpayer's 'home' is the place of his or

her business rather than the place of residence."[4]

This is footnote 4: "We note that the Supreme Court has never decided this question and that the Second Circuit disagrees with this court's position on the issue of the location of a taxpayer's 'home.' See Six v. United States, 450 F.2d 66 (2d Cir. 1971); Rosenspan v. United States, 438 F.2d 905 (2d Cir. 1971), cert. denied, 404 U.S. 864 (1971), reh'g denied, 404 U.S. 959 (1971).

Indeed this Court itself has on three occasions recognized the conflict between the circuits about the definition of "home," Flowers v. Comm., 326 U.S. 465, 472 (1946); Peurifoy v. Comm., 358 U.S. 59, 60 (1958); and Comm. v. Stidger, 386 U.S. 287, 291 (1967). However, in each of these cases the Court decided the case on other grounds,

and did not have to try to formulate a definition for the word "home" in Sec. 162.

Not only has this Court recognized the existence of this conflict about the meaning of the word "home," but also commentators have often discussed this conflict in legal periodicals, see, e.g., 38 Brooklyn L.R. 1285, (1972); 122 U. Pa. L.R. 859, 922 (1974); 46 St. Johns L.R. 540, 541 (1972); 29 U. Fla. L.R. 119, 126-8 (1976); and 49 Va. L.R. 125, 161 (1963).

Petitioners could cite many cases on each of the respective sides of the question, is home, home or place of business under Sec. 162, I.R.C. Petitioners choose not to do so. Compilations of cases can be found at 29 U. Fla. L.R. 119, 126-8 (1976) and 49 Va. L.R. 125, 131-6 (1963). As will be seen in the argument below, petitioners

rely primarily upon the conflict between circuits on the meaning of home in the context of spouses employed in different cities. Petitioners promise (if certiorari is granted) not to advance in the argument any attempted all encompassing definition of "home" under Sec. 162.

The failure to grant certiorari in Rosenspan is no reason for denying certiorari in this case. Rosenspan and Six present two different contexts about the relationship of home to place of business. In Rosenspan the taxpayer was an unmarried traveling salesman who traveled almost constantly, had no home, and wanted to call his employer's place of business his home. The appeal of the taxpayer's plight in Rosenspan is very limited: while he incurs transient type expenses, having no home, those expenses are not duplicative and, if he prevails,

almost all his costs during a year for meals and lodging become deductible.

Six presents a context of a wife employed away from an established marital residence, as does the present case. In that case, Ethel Merman (a famous actress) had in 1953 married Mr. Six, President of Continental Airlines, with headquarters in Denver. They purchased jointly a residence in the Denver area, which was the single marital residence at least through 1958. On December, 1958 she went to New York City to perform in a play, "Gypsy." Her expenses in New York City in the taxable year 1959 were at issue. The district court had decided the refund suit before the Second Circuit had adopted its "home is home" test in Rosenspan and accordingly the Second Circuit remanded for further proceedings and findings in light of Rosenspan. The

citations do not reveal any furtner opinions in Six, and clearly this Court has not denied certiorari in a case involving a conflict about the meaning of home in the context of spouses employed in different cities.

While the Second Circuit did not decide the factual question of where the home was in Six, it is clear it believed marriage counts, for it mentioned "her marriage to Mr. Six, who continued to live in the Englewood home" as a relevant factor. 450 F.2d 66, 70. There can be no reasonable doubt that the petitioner would have prevailed before the Second Circuit in an appeal from the Tax Court. If that court remanded for further proceedings and findings about where her home was, despite the fact Mrs. Six had a one year lease in New York, spent only a few days in June, 1959 at the marital residence,

and was divorced from Mr. Six in December of the next year, then a fortiori, it would decide a finding that Mrs. Felton's home was in New Albany, clearly erroneous, when she spent only 60 nights in 1978 in New Albany as a transient and had a home the rest of the year with her husband in Bloomington and at the time of the trial (if I may go outside the record, to the present time) she and her husband were devoted to each other.

II. THIS CASE PRESENTS AN APPROPRIATE VEHICLE TO REACH THE "HOME" ISSUE IN A LIMITED CONTEXT.

As noted in the first reason for granting the writ (conflict between circuits), this Court has had before it three cases in which it acknowledged the conflict about the meaning of "home," but decided the case on another ground

without reaching the issue as to the meaning of "home."

Petitioners believe that this case is one in which the "home" issue, limited to the context of two earner families, will have to be reached if certiorari is granted. Both courts below have decided the case on the "home is place of business" premise. If the Commissioner decides to avoid an argument before this Court on "home" in this case because he prefers to argue it in a future case on a record in which the wife rents an apartment in the other city for the academic year, he may try to shift the argument and ask that this case be decided on an "exigencies of the business "test" i.e., the third test in Flowers, supra. The petitioners' answer to that argument, if made, will be: She is married, and you must look at the employments of both husband and wife and

their joint efforts as man and wife to produce a flow of income to support the consumption and the savings, if any, of a family unit and its members.

Thus it appears this case presents a record on which, if the writ is granted, this Court will have to face the relevance of marriage to travel expense cases, whether it be under the second or third tests of Flowers, supra. Further, petitioners have difficulty seeing how marriage could be relevant to one of the tests, without also being relevant to both.

III. THIS CASE CAN BE DISPOSED OF QUICKLY.

Leading cases such as Flowers, supra, arose at a time when husbands were usually gainfully employed and wives were infrequently employed outside the home. In a case where only the

husband was employed, it is natural to refer to the exigencies of "his" job.

One facet of the petitioners' argument that in a two earner family, you must look at "their" employments because they are engaged jointly in an effort to earn income to support the family as a consumption unit (and to the extent there are savings, an investing unit) and combine with that a fundamental aspect of our society: we favor a wife and her husband living together in a single residence.

Petitioners believe it to be self evident that consideration of marriage and the legitimate employment concerns of one's spouse is relevant to a traveling expense issue. Perhaps the decisions of the two courts below can be explained by a reluctance to be the first court to draw a new distinction between one earner and two earner

couples, faced with a host of cases referring to "his" job and "his" place of business in situations where only the husband was employed. Furthermore, the failure to respond to the petitioners' arguments may be explained by a reluctance to be in a position to be quoted as saying "marriage doesn't count." But this Court is under no restraints in drawing a distinction between one earner and two earner families, and if this Court should reverse, a pro family posture would enhance the image of the Court.

If this Court grants certiorari, this case should not require much of this Court's time if it concludes as a rule of law that marriage is relevant in a case of two spouses employed in different cities and then that it was clearly erroneous to decide in this case that Mrs. Felton's "tax home" was in New

Albany. The lower courts could on a case by case basis develop a body of "two earner traveling expense" law with this Court probably not having to join the issue again.

One nuance in the proceedings below was sympathy for the petitioners' plight. The Tax Court footnote saw their argument "appealing sociologically," and there is this sentence from the brief of the appellee before the Seventh Circuit, "Althougn we sympathize with taxpayers' plight and that of similarly situated families, any relief in this regard, as pointed out by Judge Murnaghan in his concurring opinion in Daly, can only come from the Congress."

This is tantamount to an argument that the courts have painted themselves into a corner so that "marriage doesn't count," even though the courts below

were reluctant to state that explicitly. This Court can obviously say that marriage is relevant in a two earner traveling expense case, for the law about traveling expenses is of judicial origin. Assuming for purposes of argument that some Courts of Appeal (but not the Second Circuit) believe they are in corner, this Court is the perfect tribunal to disabuse those courts of the belief that marriage is irrelevant in a two earner traveling expense issue.

IV. THE ISSUE IN THE CASE IS IMPORTANT.

Two trends in our society make the issue in this case one of increasing importance. First, an increasing percentage of wives work and second, an increasing percentage of women have specialized qualifications for which

employment is not readily available in almost every area, in contrast to employments such as secretaries, waitresses, elementary school teachers, and store clerks. Indeed the facts in this case are likely to emerge as the typical case, i.e., the wife with a bachelor's degree whose husband has an established position and who goes back for an advanced degree. Once she has an advanced degree she may have to look to another geographical area for employment utilizing her specialized education.

Recent articles, comments and notes in legal periodicals reflect the importance of the traveling expense deduction in the context of two earner family. In Popkin, "Deduction of the Traveling Expenses by the Two Worker Family," 55 Texas L. Rev. 645 (1977), the author starts his article with this sentence, "As it has become more common

for both spouses to work, an ability to deduct additional expenses that result from the decision of both husband and wife to work has increased in importance." He suggests (for married persons) as a test for the deductibility of traveling expenses "what could reasonably be expected of a married individual." One of his premises is that the usual life style of married persons is to live together and that this is recognized by various provisions in the Internal Revenue Code.

Some recent writing about the two earner family has been a reaction to Daly v. Comm., which, while distinguishable, has some similarity to this case. There were two Daly opinions, the first, 631 F.2d 351, (4th Cir., 1980) by a three judge panel and the second after a rehearing en banc. The similarity of Daly to this case is

that Mr. Daly obtained a sales territory which did not include the site of the marital residence. His wife had a position as manager of a store in the general vicinity of the marital residence. Thus Mr. Daly faced a problem similar to Mrs. Felton in the present case -- whether to move away from the existing marital residence. Both Mr. Daly and Mrs. Felton accommodated to the spouse's employment and kept a single marital residence, rather than setting up a separate, second home. Mr. Daly did some office work at the marital residence, but unfortunately for him the selling could be done only in the territory -- and the hours worked in the territory were at least twice as many as the hours of work at the marital residence. Mrs. Felton, since she could do her research, class preparation, and reading to keep current

in her field in the vicinity of the marital residence, worked more than twice as many hours at the marital residence as she did in New Albany.

One aspect of the Daly case was that the husband did not argue that "his wife's legitimate employment concerns should play a role in determining where his tax home should be fixed." We do make the argument here that her husband's legitimate employment concerns must be considered in determining Mrs. Felton's tax home.

Daly produced a sharp division among the judges of the Fourth Circuit. The first decision was for the taxpayer by a 2 to 1 vote. On the rehearing en banc nine judges participated: five joined in the majority opinion, Judge Murnaghan concurred in an opinion that in some ways reads more like a dissent, and three judges dissented. If the position

of Senior Circuit Judge Field, who voted for the taxpayers in the first Daly opinion, but did not sit on the en banc rehearing, is taken into account the vote is five for the majority, one judge concurring, and four judges in dissent.

"Comment - Daly v. Commissioner: Effect of the Tax Home Rule Under Section 162 on Two-Earner Families," 34 The Tax Lawyer 829 (1980-1) is a comment on the first Daly opinion. The author found shortcomings in the legal analysis, but that "its outcome may be justifiable on social policy grounds." The conclusion of the author was "that two-earner spouses who cannot avoid working in different cities should be granted traveling expense deduction. . . ."

In the Winn and Winn, "Till Death Do We Split: Married Couples and Single Persons under the Individual Income

Tax," 34 S. Car. L.R. 829, 864 the authors see the first Daly as a case "departing from settled rules, [but] recogniz[ing] sociological and demographic change."

A case note on the second Daly opinion, 18 Wake Forest L.R. 99 (1982) sees the result as involving "harsh consequences" for a salesman with a territory, instead of a single place to work.

V. THAT THIS IS A SMALL TAX CASE MERITS FAVORABLE CONSIDERATION.

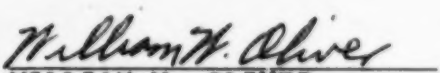
The amount of tax at issue in this proceeding is slightly more than $700. Such cases are likely to arise in the academic world since much of the work of a professor may be performed at any place where there are adequate library and other research facilities available. The tax deficiencies will

typically be small, so that the cost of litigation through to this Court will typically be far greater than the amount of the tax deficiency. If the Court does not grant certiorari in this case to address the conflict between circuits in the context of a two earner family, there may not be another opportunity for the Court to resolve the conflict until a case arises involving spouses in top tax brackets, such as a famous actress and the president of a large corporation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and unpublished order of the Seventh Circuit.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted: September 7, 1983*

October 21, 1983

Before

Hon. Richard D. Cudahy, Circuit Judge

Hon. John L. Coffey, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

DONALD C. FELTON and MARIANNE V. FELTON, Petitioners-Appellants,	Appeal from the United States Tax Court
No. 82-1540 vs.	No. 3120-80 William M.
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	Fay, Judge.

ORDER

I.

This is an appeal from a decision of the United States Tax Court upholding the appellee Commissioner's disallowance of certain travel expenses deducted by the appellant, Marianne V. Felton,[1] for the taxable year 1978. Felton v. Commissioner, 43 T.C.M. (CCH) 278 (1982). We affirm.

II.

During the period in question, the Feltons resided in Bloomington, Indiana. Mr. Felton worked in Bloomington and his wife was completing her Ph.D. in economics at Indiana University. During the academic years 1976-1977 and 1977-1978, Mrs. Felton worked on a temporary basis as a visiting lecturer at Indiana University Southeast (IUSE), located in New Albany, Indiana. New Albany is approximately

100 miles from Bloomington. The Feltons lived in Bloomington while Mrs. Felton was a visiting lecturer at IUSE.[2] For the 1978-1979 academic year, appellant accepted a permanent, tenure-track position at IUSE, after unsuccessfully attempting to find satisfactory employment closer to Bloomington. Appellant did not move to New Albany, but continued to reside in Bloomington.

Mrs. Felton's duties as a professor included teaching classes, preparing for classes, holding office hours to meet with students and doing research. The university provided appellant with an office and a classroom in New Albany to perform her duties. To minimize the expense of traveling to New Albany, appellant arranged her schedule so that her classes and office hours were on Monday nights, Tuesday mornings, Wednesday nights and Thursday mornings.

Mrs. Felton stayed overnight in New Albany on Mondays and Wednesdays and spent the rest of the week in Bloomington. Appellant calculated that she worked 22 hours a week in New Albany and 30 hours a week in Bloomington. The research facilities available in Bloomington were more extensive than those in New Albany. Many of the materials available in Bloomington could be acquired by the New Albany library using the inter-library loan system, but certain journals and books were unavailable through inter-library loan. Economics professors at IUSE generally traveled to Bloomington three or four times a year to use the research facilities there. A computer center was also located in Bloomington, which Mrs. Felton considered essential to her work.

From August, 1978 through December, 1978, appellant incurred expenses of

$1,701.03 in traveling between Bloomington and New Albany and in securing overnight lodging twice a week. The Tax Court held that the expenses were nondeductible commuting costs. The court found that Mrs. Felton's tax "home" was New Albany, not Bloomington. The expenses at issue could not be deducted, the court ruled, because Mrs. Felton was not away from "home" when they were incurred. This appeal followed.

III.

The starting point for analyzing the deductibility of traveling expenses under § 162(a) of the Internal Revenue Code[3] is Commissioner v. Flowers, 326 U.S. 465 (1946). The Supreme Court set forth three conditions which must be satisfied before travel expenses are deductible: (1) the expense must be reasonable and necessary; (2) the

expense must be incurred while away from home; and (3) the expense must be incurred in the pursuit of business. Id. at 470. The taxpayer must meet all three requirements for the expense to be deductible. The purpose of the deduction for business travel expenses is "to mitigate the burden of the taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode and thereby incur additional and duplicate living expenses." Kroll v. Commissioner, 49 T.C. 557, 562 (1968).

Whether or not a particular expenditure satisfies all three conditions "is purely a question of fact in most instances. And the Tax Court's inferences and conclusions on such a factual matter, under established principles, should not be disturbed by an appellate court." Flowers, 326 U.S.

at 470 (citations omitted). See also Michel v. Commissioner, 629 F.2d 1071, 1073 (5th Cir. 1980); Coombs v. Commissioner, 608 F.2d 1269, 1274 (9th Cir. 1979); 4A Mertens, Law of Federal Income Taxation § 25.93 (1979). The Tax Court's findings will not be disturbed on appeal unless clearly erroneous. Fed. R. Civ. P. 52(a); 26 U.S.C. § 7482(a); see Commissioner v. Duberstein, 363 U.S. 278, 291 (1960). The Tax Court's findings in the instant case are supported by the record.

For purposes of the travel expense deduction, a taxpayer's "home" is the place of his or her business rather than the place of residence.[4] Weiberg v. Commissioner, 639 F.2d 434, 437 (8th Cir. 1981); Michel v. Commissioner, 629 F.2d at 1073; Markey v. Commissioner, 490 F.2d 1249, 1253 (6th Cir. 1974); England v. United States, 345 F.2d 414,

417 (7th Cir. 1965), cert. denied, 382 U.S. 986 (1966). Cf. Daly v. Commissioner, 662 F.2d 253 (4th cir. 1981); Jones v. United States., 648 F.2d 1081 (6th Cir. 1981); Hantzis v. Commissioner, 638 F.2d 248 (1st Cir. 1981), cert. denied, 452 U.S. 962 (1981); Coombs v. Commissioner, 608 F.2d 1269 (9th Cir. 1979).

Appellant claims that her "home" during the taxable year in question, within the meaning of I.R.C. § 162(a)(2), was Bloomington. Her argument is based primarily upon her claim that she performed more work in Bloomington (30 hours per week, on tne average) than in New Albany (22 hours per week). But it is not the place where work is performed, but rather the requirements of the taxpayer's business as to where the taxpayer must work that is determinative in ascertaining the

location of a taxpayer's "home." "The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors." Flowers, 326 U.S. at 474. In this case, the only location where appellant was required to work was in New Albany, where she taught classes and held office hours for students. Her decision to do work in Bloomington was based primarily upon personal convenience, not upon business necessity. Her husband was working in Bloomington and the Feltons had a home there. Appellant's employer did not require her to live in Bloomington nor did it require that she work in Bloomington. Compare United States v. Blanc, 278 F.2d 571 (5th Cir. 1960) (state supreme court justice required by law to live in one community and work in another).

Appellant asks this court to adopt a "reasonableness to move" test. Under the proposed approach, the deductibility of the travel expenses at issue would depend on whether it was reasonable to expect Mrs. Felton to move her residence to New Albany after accepting the permanent position at IUSE. We decline to adopt this argument for the reasons stated in Kasun v. United States, 671 F.2d 1059, 1062 (7th Cir. 1982).

There was sufficient evidence for the Tax Court to find that Mrs. Felton's tax "home" was New Albany. The expenses at issue in this case are not deductible under § 162(a)(2) because appellant was not away from that "home" when those expenses were incurred. Appellant's expenses were nondeductible commuting expenses.

For the foregoing reasons, the decision of the Tax Court is AFFIRMED.

*After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P. (effective Aug. 1, 1979); Circuit Rule 14(f). Petitioner-appellants have filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

[1]Appellant, Donald C. Felton, husband of Marianne V. Felton, is a party to this action because he and his spouse filed a joint federal income tax return for the year in question. Further references to "appellant" are to Mrs. Felton.

[2]For the academic years 1976-1977 and 1977-1978, the Commissioner allowed taxpayer to deduct travel expenses between Bloomington and New Albany because her job was "temporary." Those expenses are not at issue in the instant appeal.

[3]Section 162(a)(2) of the Internal Revenue Code of 1954, as amended, provides as follows:

> § 612. Trade or business expenses
>
> (a) In general.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

. . .

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavisn or extravagant under the circumstances) while away from home in the pursuit of a trade or business.

[4]We note that the Supreme Court nas never decided this question and that the Second Circuit disagrees with this court's position on the issue of tne location of a taxpayer's "home." See Six v. United States, 450 F.2d 66 (2d Cir. 1971); Rosenspan v. United States, 438 F.2d 905 (2d Cir. 1971), cert. denied, 404 U.S. 864 (1971), ren'g denied, 404 U.S. 959 (1971).

APPENDIX B

T. C. Memo. 1982-11

UNITED STATES TAX COURT

DONALD C. FELTON and MARIANNE V. Felton,
Petitioners
v. COMMISSIONER OF INTERNAL REVENUE
Respondent

Docket No. 3120-80.
Filed January 11, 1982

William W. Oliver, for the petitioners

Deborah Gehring, for the respondent

MEMORANDUM FINDINGS OF FACT AND OPINION

FAY, Judge: Respondent determined deficiencies of $1,354.00 and $1,429.63 in petitioners' Federal income tax for 1977 and 1978, respectively. The only issue for decision is whether certain travel expenses incurred in 1978 are non-deductible personal expenses or

ordinary and necessary business expenses deductible under section 162.[1]

FINDINGS OF FACT

Some facts have been stipulated and are found accordingly.

Petitioners, Donald C. Felton and Marianne V. Felton, were residents of Indiana when they filed their petition in this case.

In 1961, Donald C. Felton retired from the army, and petitioners moved to Bloomington, Ind., so he could attend Indiana University. After obtaining a degree, he accepted employment with Indiana University in Bloomington and remained in that position through the years in issue.

In 1968, Marianne V. Felton (hereinafter petitioner) enrolled in Indiana University in Bloomington and received her Master's degree in 1971.

Her specialty is cultural economics. She was unable to find satisfactory employment in that field in the immediate Bloomington area. For a while, she taught part-time in Indianapolis, which is about 50 miles from Bloomington.

During the academic years 1976-1977 and 1977-1978, petitioner was employed on a temporary basis as a Visiting Lecturer in Economics at Indiana University Southeast in New Albany, Ind. While New Albany is approximately 100 miles from Bloomington, petitioner did not move her personal residence to New Albany.[2]

For the academic year 1978-1979 (August 15, 1978, to May 15, 1979), petitioner obtained a full-time, permanent position at Indiana University Southeast in New Albany. From August through December 1978, she was a

Lecturer. Effective January 1979, she became an Assistant Professor of Economics--a promotion which carried not only the benefits of a salary increase but the benefits of tenure credit as well. Her promotion resulted from her successful completion of a Ph.D. in Economics at Indiana University in Bloomington in December 1978.[3]

Although petitioner's employment in New Albany became permanent in August 1978, she still did not move her personal residence there. Petitioner arranged her schedule whereby she taught on Monday nights, Tuesday mornings, Wednesday nights and Thursday mornings, and she maintained office hours in New Albany on those days. With that schedule, petitioner was able to limit her nights in New Albany to two each week. Thus, she would drive to New Albany on Monday, return to Bloomington

on Tuesday, drive to New Albany on Wednesday, and return to Bloomington on Thursday. On the nights she stayed in New Albany, petitioner rented a room. Petitioner calculates that she spent an average of 22 hours each week working in New Albany.

As a lecturer at Indiana University Southeast, petitioner was expected to do scholarly research as well as to teach classes.[4] Some of her preparation and most of her research was done in Bloomington. By petitioner's calculation, she spent an average of 30 hours each week working in Bloomington.

Petitioner's research was aimed at three related goals: (1) keeping abreast of developments in her field; (2) completing her doctorate dissertation; and (3) preparing scholarly articles and papers. The library facilities at Bloomington are

more expansive than those at New Albany. While materials could be obtained by the New Albany library from the Bloomington library through inter-library loan, some journals and reference books were unavailable through that system. There was also a computer center in Bloomington which petitioner considered essential to her work. In general, professors in the Indiana University Southeast Economics Department made three or four trips to Bloomington each year to use the facilities there.

From August 1978 through December 1978, petitioner incurred expenses of $1,701.03 traveling between New Albany and Bloomington. In his statutory notice of deficiency, respondent disallowed the deduction of those expenses.[5]

OPINION

The issue presented is whether expenses incurred by petitioner Marianne V. Felton in traveling between Bloomington and New Albany from August 1978 through December 1978 are section 162 ordinary and necessary business expenses or section 262 nondeductible personal expenses.

Respondent contends petitioner's "tax home" was New Albany, and the expenses she incurred were nondeductible commuting expenses. Respondent also maintains since petitioner's choice to live in Bloomington was personal, the expenses were not incurred in the pursuit of a trade or business. Petitioner contends Bloomington was her "tax home," and her expenses are deductible as "away from home" traveling expenses under section 162(a)(2). Additionally, petitioner argues the

deduction should be allowed, because it was unreasonable to expect her to move her personal residence to New Albany.

Section 162(a)(2) permits a taxpayer to deduct traveling expenses, including meals, lodging, and transportation, incurred while "away from home" in the pursuit of a trade or business. See also Commissioner v. Flowers, 326 U.S. 465, 470 (1946). The purpose of that deduction is "to mitigate the burden of the taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode and thereby incur additional and duplicate living expenses." Kroll v. Commissioner, 49 T.C. 557, 562 (1968) (emphasis added). Thus, it is the expenses arising from business considerations that fall within section 162(a)(2). With that in mind, this Court has consistently interpreted

"home," as it is used in section 162(a)(2), as referring to the vicinity of a taxpayer's principal place of business, rather than to the taxpayer's personal residence. Mitchell v. Commissioner, 74 T.C. 578 (1980); Montgomery v. Commissioner, 64 T.C. 175 (1975), affd. 532 F.2d 1088 (6th Cir. 1976); Coerver v. Commissioner, 36 T.C. 252 (1961), affd. 297 F.2d 837 (3d Cir. 1962).

In determining a taxpayer's "home," an objective test applies. Foote v. Commissioner, 67 T.C. 1 (1976). While that test has occasionally been stated as an inquiry into whether it would be reasonable for a taxpayer to move his personal residence to the vicinity of the business location under consideration, that does not mean that subjective elements, such as personal preference or family location, come into

play. See generally Tucker v. Commissioner, 55 T.C. 783 (1971). See also Frederick v. United States, 603 F.2d 1292 (8th Cir. 1979).

In the case before us, we find petitioner Marianne V. Felton's tax "home" was in New Albany during the period in issue. The focal point of a university lecturer's duties is teaching in the classroom and dealing with students. Those duties take place almost exclusively on campus. While research is an integral part of the job, in most cases it can be accomplished principally on campus. We are unconvinced this case is any different. Petitioner's teaching and interaction with students occurred in New Albany. While some of her research necessarily was done in Bloomington, most of it could have been done in New Albany. It appears to us petitioner chose to center

her research activities in Bloomington for personal reasons. Those reasons can play no part in the determination of her tax "home." As the Circuit Court of Appeals for the Eighth Circuit said, "The job, not the taxpayer's pattern of living, is the crucial matter." Frederick v. United States, supra at 1295.[6]

Having found petitioner's tax "home" was New Albany, the expenses at issue herein cannot be deducted under section 162(a)(2) simply because petitioner was not away from that "home" when those expenses were incurred.[7] Viewed as expenses of traveling from Bloomington to New Albany, petitioner's expenses are nondeductible costs of commuting. Commissioner v. Flowers, supra.[8]

To reflect concessions and the foregoing,

Decision will be entered under Rule 155.

[1]All section references are to the Internal Revenue Code of 1954, as amended.

[2]During the academic years 1976-1977 and 1977-1978, petitioner incurred expenses of $5,128.53 traveling between Bloomington and New Albany. For purposes of this case, respondent concedes that during those years petitioner's employment was temporary, and her travel expenses are thus deductible.

[3]Petitioner's dissertation was completed in early November 1978 and successfully defended on December 4, 1978.

[4]There were also some minor administrative duties attached to petitioner's employment.

[5]In his statutory notice of deficiency, respondent also disallowed the deduction of travel expenses incurred by petitioner during the academic years 1976-1977 and 1977-1978. As previously noted, respondent now concedes the deductibility of those expenses because petitioner's employment during those years was temporary.

[6]As part of her "reasonable to move" argument, petitioner argues that failure to consider personal elements in a case such as hers puts undue strain on two job families. While petitioner's point perhaps is appealing sociologically, it has no basis in law. See Foote v. Commissioner, 67 T.C. 1, 6-7 (1976); Tucker v. Commissioner, 55 T.C. 783, 788 (1971). See also Daly v. Commissioner, ___F.2d___, 48 AFTR2d 81-6008, 81-2 U.S.T.C. ¶ 9721 (4th Cir. 1981) (Murnaghan, Jr., concurring), revg. 631 F.2d 351 (4th Cir. 1980), and affg. 72 T.C. 190 (1979).

[7]Having found that petitioner's expenses are not deductible under sec. 162(a)(2) because

she was not "away from home," we do not address respondent's argument concerning "in pursuit of a trade or business." However, see the discussion in Commissioner v. Hantzis, 638 F.2d 248 (1st Cir. 1981).

[8]Petitioner makes no argument concerning the deductibility of any transportation expenses for traveling from her tax "home," New Albany, to Bloomington to do any research which could not be done in New Albany. Therefore, we do not address that question. However, see Chappie v. Commissioner, 73 T.C. 823, 828-829 (1980), and note concession made in Montgomery v. Commissioner, 64 T.C. 175 (1975), affd. 532 F.2d 1088 (6th Cir. 1976).

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 22, 1983

Before

Hon. Richard D. Cudany, Circuit Judge

Hon. John L. Coffey, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

DONALD C. FELTON and MARIANNE V. FELTON, Petitioners-Appellants,	Appeal from the United States Tax Court
No. 82-1540 vs.	No. 3120-80 William M.
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	Fay, Judge.

ORDER

On consideration of the petition for reharing and suggestion for rehearing in banc filed in the above-entitled cause

by appellants, no judge in active services has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

QUOTATIONS TO SHOW QUESTION PRESENTED

BRIEF FOR APPELLANTS, SEVENTH CIRCUIT

Page 1. "Maintenance of a single marital residence should be an objective of the law, even including tax law."

Page 11. "Perhaps as a result of ignoring . . . the petitioner's [sic] arguments about the relevance of marital obligations to a "tax home" issue, the [Tax] Court failed to find various uncontroverted facts relevant to the petitioners' argument, such as, e.g., that her husband Colonel Felton could in the fall of 1978 have joined her in a move to New Albany and obtain

employment in that vicinity only by resigning from the staff of Indiana University and suffering a diminution of his retirement benefits from that employment."

Page 15. "[The author] suggests (for married persons) as a test for the deductibility of travel expenses what could reasonably be expected of a married individual."

REPLY BRIEF FOR THE APPELLANTS, SEVENTH CIRCUIT

Page 2. "In effect the position of the Service and the Tax Court is that you can't for personal [i.e., desire to live with her husband in their established marital residence]

reasons contract to do the majority of your work away from the place you teach. The appellants' position is that when the employment duties are such that they do not have to be performed in any particular place, married persons should be encouraged to do as much work as is feasible under their employment responsibilities in the vicinity of the marital residence when it is not feasible for their spouse to change employment and move the marital residence."

AMICUS BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS BEFORE THE SEVENTH CIRCUIT

Page 2. "This case involves the application of these

principles to the two-worker household. It is unreasonable to expect a working wife to separate from her husband and abandon the marital domicile. . . . We therefore urge the court to adopt a rule tnat permits the deduction of traveling expenses whenever the taxpayer-spouse is traveling to the secondary or minor place of work of the marital unit."

BRIEF FOR THE PETITIONERS,
U.S. TAX COURT

Page 21. "Reasonable choice of a home under all the circumstances must include the circumstances of a taxpayer's marriage."

Page 7. "Comm. v. Flowers, 326 U.S. 465 (1946) involved a high bracket taxpayer, whose wife did not work, and who wanted a tax deduction to help subsidize the extra cost arising from his and his wife's choice not to move the marital residence to the area where he was pursuing his profession. The instant case involves the SErvice wanting a working wife at prohibitive, wasteful cost to establish a residence away from the marital residence where her husband is working, even though under the arrangement with her employer it is feasible for her to spend five nights a week at home with her husband and do

most of her work in the area where their home is located."

No. 83-1401

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD C. FELTON AND MARIANNE V. FELTON,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the court of appeals' holding that she was not entitled to deduct as a business expense the cost of commuting between her personal residence and her place of employment. The decision below is correct and does not conflict with that of any other circuit. There is no basis for review by this Court.

1. During 1978, petitioner and her husband[1] resided in Bloomington, Indiana (Pet. App. 2). Petitioner's husband worked in Bloomington (*ibid.*). In August 1978, after trying unsuccessfully to find satisfactory employment closer to Bloomington, petitioner accepted a full-time position at a university in New Albany, Indiana, some 100 miles away (*id.* at 3). Her duties at the university included teaching

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[1] Petitioner's husband is a party solely by virtue of having filed a joint return with her for the tax year in question.

classes, preparing for class, holding office hours, and doing research (*id.* at 3, 17). She was required to be in New Albany to fulfill her teaching and student-counseling duties, and the university provided her with an office and a classroom for those purposes (*id.* at 3). Petitioner was otherwise free to reside where she pleased (*id.* at 9).

After she accepted the job in New Albany, petitioner and her husband continued to maintain their personal residence in Bloomington (Pet. App. 16). To minimize the expense of traveling, petitioner scheduled her university classes and office hours so as to limit her overnight stays in New Albany to two nights each week (*id.* at 3-4, 16). She did all her teaching and student counseling, and much of her class preparation, in New Albany (*id.* at 17). She did some of her class preparation, and most of her research, in Bloomington (*ibid.*).

From August 1978 through December 1978, petitioner incurred $1,700 in expenses commuting between Bloomington and New Albany and securing overnight lodging in the latter city twice a week (Pet. App. 5). She deducted these expenses for federal tax purposes under Section 162(a)(2) of the Code,[2] which permits the deduction of "ordinary and necessary [business] expenses paid or incurred during the taxable year," including "traveling expenses * * * while away from home in the pursuit of a trade or business." On audit, the Commissioner disallowed the claimed deduction. He contended that petitioner's "home" for tax purposes was New Albany, and hence that she did not incur the expenses "while away from home." Alternatively, he argued that petitioner's decision to reside in Bloomington was a personal one, unaffected by employment requirements, and

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[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

hence that she did not incur the traveling expenses "in the pursuit of a trade or business" (Pet. App. 19).

The Tax Court, in a memorandum decision, upheld the Commissioner's determination (Pet. App. 13-25). It found that petitioner's principal place of business, and thus her tax "home," was New Albany, reasoning that "[t]he focal point of a university lecturer's duties is teaching in the classroom and dealing with students," activities that "take place almost exclusively on campus" (*id.* at 22). The fact that petitioner did most of her research in Bloomington, the court concluded, did not make that city her tax "home," since she "chose to center her research activities [there] for personal reasons" (*id.* at 22-23). Having concluded that petitioner's traveling expenses were nondeductible because not incurred "while away from home," the Tax Court did not address the Commissioner's alternative contention that they were nondeductible because not incurred "in the pursuit of a trade or business" (*id.* at 24-25 n.7).

The court of appeals affirmed in an unpublished judgment order (Pet. App. 2). It noted that the deductibility of traveling expenses " 'is purely a question of fact in most instances.' " *Id.* at 6-7 (quoting *Commissioner* v. *Flowers*, 326 U.S. 465, 470 (1946)). It held that "[t]here was sufficient evidence for the Tax Court to find that [petitioner's] tax 'home' was New Albany," rather than Bloomington, as she contended (Pet. App. 10).

2. In holding that petitioner could not deduct her commuting costs, the courts below reached the only result consistent with the statutory scheme and with the decisions of this Court. Section 162(a)(2), as noted above, authorizes the deduction of "traveling expenses" incurred by a taxpayer "while away from home in the pursuit of a trade or business." Section 262, by contrast, prohibits the deduction of "personal, living, or family expenses." Thus, as this Court

has held, a travel expense must meet three requirements to be deductible: (1) it must be "reasonable and necessary," (2) it must be "incurred 'while away from home,' " and (3) it must be "incurred in pursuit of business." *Flowers*, 326 U.S. at 470 (1946). "Failure to satisfy any one of the three conditions destroys the traveling expense deduction" (*id.* at 472).

As the courts below properly concluded (Pet. App. 6, 20), Section 162(a)(2) provides an exception to the general prohibition against deduction of living expenses only to the extent necessary to mitigate the burden on a taxpayer who must maintain two places of abode, and thereby incur duplicative living costs, because of the exigencies of his trade or business. "The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors." *Flowers*, 326 U.S. at 474. The deduction for business-motivated traveling expenses is not available to a taxpayer, like the taxpayer here, whose decision to "incur[] extra living expenses in [one city], while doing much of his [or her] work in [another], [is] occasioned solely by his [or her] personal propensities." *Flowers*, 326 U.S. at 473-474. Accord, *e.g.*, *Daly* v. *Commissioner*, 662 F.2d 253 (4th Cir. 1981) (en banc), aff'g 72 T.C. 190 (1979).

3. Contrary to petitioner's contention (Pet. 8-14), there is no conflict among the circuits on the question presented. To be sure, the courts of appeals do disagree as to the meaning of the word "home" as used in Section 162(a)(2). The court below, following the Tax Court and the majority of the circuits, concluded that a taxpayer's "home" for Section 162 purposes is his principal place of business. Pet. App. 8-9, 12 n.4.[3] The Second Circuit, by contrast, has consistently held

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[3]Accord, *e.g.*, *Markey* v. *Commissioner*, 490 F.2d 1249 (6th Cir. 1974); *Curtis* v. *Commissioner*, 449 F.2d 225 (5th Cir. 1971); *Wills* v. *Commissioner*, 411 F.2d 537 (9th Cir. 1969); *Barnhill* v. *Commissioner*, 148 F.2d 913 (4th Cir. 1945); *Mitchell* v. *Commissioner*, 74 T.C. 578 (1980).

that a taxpayer's "home" is the site of his personal residence.[4] This disagreement, however, is merely academic, and has not given rise to any actual conflict of decision.

The courts of appeals have disagreed on this definitional issue for over 40 years. See *Coburn* v. *Commissioner*, 138 F.2d 763 (2d Cir. 1943). This Court acknowledged the disagreement in *Flowers* (326 U.S. at 472), but "deem[ed] it unnecessary * * * to enter into or to decide [it]." See *Commissioner* v. *Stidger*, 386 U.S. 287, 292-294 (1967). It is equally unnecessary to resolve the disagreement here. Whenever a taxpayer incurs travel expenses because of the fact that he lives and works in different places, the deductibility of those expenses in the final analysis turns on whether the separation between his places of residence and employment is "required by 'the exigencies of business' " or is occasioned by personal considerations. *Peurifoy* v. *Commissioner*, 358 U.S. 59, 60 (1958) (per curiam) (quoting *Flowers*, 326 U.S. at 474). Since the courts below found that petitioner incurred the disputed travel expenses for personal reasons, their decisions were correct regardless of whether petitioner's "home" for Section 162(a)(2) purposes is considered to be Bloomington, as she contends (Pet. 18-19), or New Albany, as the courts below held (Pet. App. 10, 22-23). Because the facts here, like the facts in *Flowers*, "demonstrate clearly that the expenses [at issue] were not incurred in the pursuit of the business of the taxpayer's employer" (326 U.S. at 473), it is immaterial whether those expenses were incurred at, or away from, petitioner's "home." See *id.* at 470, 472.

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[4] *E.g.*, *Six* v. *United States*, 450 F.2d 66 (2d Cir. 1971); *Rosenspan* v. *United States*, 438 F.2d 905 (2d Cir.), cert. denied, 404 U.S. 864 (1971); *Coburn* v. *Commissioner*, 138 F.2d 763 (2d Cir. 1943).

4. Petitioner's assertion (Pet. 20-26) that the decision below fails to recognize the plight of two-wage-earner families, and that it will aggravate the marital strains inherent in such families, provides no ground for review by this Court. Such policy considerations are matters of congressional, not judicial, concern. See *Daly* v. *Commissioner*, 662 F.2d at 255 (Murnaghan, J., concurring).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

DOJ-1984-04

No. 83-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD C. FELTON *and* MARIANNE V. FELTON,
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v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

This brief is filed, with the consent of all parties, by the American Association of University Professors ("AAUP") as *amicus curiae* in support of the petition for certiorari filed February 21, 1984.

INTEREST OF THE *AMICUS*

The AAUP is a membership organization of 65,000 faculty members and research scholars at American institutions of higher education. Founded in 1915, it is the nation's oldest and largest organization dedicated exclu-

sively to the interests of professional scholars in all academic disciplines.

One of the AAUP's principal tasks, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for the protection of academic freedom and tenure. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure*, prepared jointly by the AAUP and the Association of American Colleges and subsequently endorsed by more than one hundred educational organizations and learned societies. Courts throughout the country, including this Court, frequently refer to AAUP policy statements in resolving disputes over the terms and conditions of faculty employment.[1]

The AAUP frequently speaks for the teaching profession in matters relating to the compensation and financial security of faculty members.[2] The AAUP has been especially active over the years in addressing the application of federal tax policy to the unique income and expense patterns associated with university teaching. Because federal income taxation raises particular problems in the context of higher education, the AAUP maintains a standing Committee on Taxation and participates, on a highly selective basis, in administrative and judicial pro-

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[1] *E.g.*, *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 756 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972). *See Gray v. Board of Higher Education*, 692 F.2d 901, 907 (2d Cir. 1982) ("AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies").

[2] The 1940 *Statement of Principles* declares that tenure is a means to ensure "a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society." *Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments, reprinted in* 64 AAUP BULL. 108, 109 (1978).

ceedings raising tax issues of consequence to faculty members.

This case presents an issue of great significance to men and women who wish to pursue careers as professional scholars while meeting their obligations as husbands, wives, and parents. The case concerns the tax treatment of travel expenses incurred by a family whose members are forced to accept jobs in different cities. This problem, encountered by many two-worker households, is especially acute for husband-and-wife faculty members. The notoriously tight job market for professorial positions is accentuated by the small number of positions available in particular academic disciplines within a particular geographic area. It is rare for a husband and wife searching for their initial academic appointments to obtain work in the same city at the same time. Frequently, their only option if they wish to continue in their chosen fields is to do what Donald and Marianne Felton did here—accept teaching positions when and where available, while accommodating their lifestyles to the inconvenience and added expense of living apart some of the time. To the extent that federal tax policy intrudes in so sensitive an area, it should preserve —not foreclose—the options available to the husband and wife who must reconcile the conflicting demands of their personal and professional lives.

The tax treatment of travel and travel-related expenses incurred by husbands and wives working in different locations is extremely important to university faculty members. The AAUP is well situated to express the views of the many professors who have a direct stake in the outcome of this case.

REASONS FOR GRANTING THE WRIT

Introduction and Summary of Argument

This case presents a recurring question of federal income tax administration that has provoked an acknowledged conflict in the circuits. Section 162(a)(2) of the Internal Revenue Code[3] authorizes taxpayers to deduct "traveling expenses" incurred "while away from home in the pursuit of a trade or business. . . ." Because "home" is not defined in the Code or implementing regulations, courts are repeatedly required to resolve an ambiguity that arises whenever a taxpayer maintains a residence in one location and performs work in another. Some courts, including the court below in this case, have adopted the position ordinarily advocated by the Commissioner of Internal Revenue that a taxpayer's "home," for the purpose of determining deductible travel expenses under Section 162(a)(2), is the taxpayer's *principal place of business*.[4] Other courts have explicitly rejected the Commissioner's position and treated the taxpayer's *residence* as the "home" for travel-expense purposes.[5] This Court has acknowledged the division between the circuits, but has not resolved it.[6]

Section 162(a)(2) affords relief to the taxpayer who incurs out-of-pocket expenses because of the demands or exigencies of the job. The statute allows the taxpayer

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[3] 26 U.S.C. § 162(a)(2) (1976).

[4] *E.g.*, *Weiberg v. Comm'r*, 639 F.2d 434 (8th Cir. 1981); *Michel v. Comm'r*, 629 F.2d 1071 (5th Cir. 1980). *See* Rev. Rul. 60-189, 1960-1 C.B. 60, *amplified in* Rev. Rul. 83-82, 1983-1 C.B. 45.

The Commissioner, however, has not been entirely consistent in defining the statutory term "home" for travel-deduction purposes. *E.g.*, Rev. Rul. 73-529, 1973-2 C.B. 37, 38; *Rambo v. Comm'r*, 69 T.C. 920, 923-25 (1978) (arguing that "home" means "residence").

[5] *E.g.*, *Six v. United States*, 450 F.2d 66 (2d Cir. 1971); *Rosenspan v. United States*, 438 F.2d 905 (2d Cir.), *cert. denied*, 404 U.S. 884 (1971).

[6] *See Comm'r v. Stidger*, 386 U.S. 287, 291 (1967).

to deduct the cost of amenities (such as food and lodging) that are ordinarily treated as personal expenses when the taxpayer is "home." The general principle underlying the deduction is that there are circumstances under which the taxpayer cannot reasonably be expected to change residence just to minimize or avoid work-related expenses. The most common example of such a circumstance is the taxpayer who is assigned temporarily to a job in another city with the expectation that he or she will return home when the temporary tour of duty is over; the Service and the courts agree that the taxpayer's travel expenses are fully deductible.[7]

This does not mean, however, that the location of the taxpayer's "home" for tax purposes should be determined in every instance by mechanical reliance on the duration of the taxpayer's employment in a distant city. Professor Marianne Felton's case involves the application of the general principle underlying the Section 162(a)(2) deduction to the increasingly common predicament of a husband and wife compelled by the academic job market to maintain a secondary residence in addition to the marital home. We urge the Court to grant the writ of certiorari in order to consider adopting a rule that permits the deduction of travel expenses when a taxpayer travels to and from the secondary or minor place of work of the marital unit. The tax laws already contain a test for identifying an individual taxpayer's secondary or minor place of work for the purpose of determining deductible expenses incurred while traveling between two jobs. That test could easily be applied to a marital unit of two workers.

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[7] Rev. Rul. 83-82, 1983-1 C.B. 45. *See Comm'r v. Mooneyhan*, 404 F.2d 522 (6th Cir. 1968), *cert. denied*, 394 U.S. 1001 (1969).

Argument

Most taxpayers do not live in the same building in which they work, and are thus required to travel between work and home. The expenses associated with that travel are clearly work-related, in the sense that they are not incurred by taxpayers who do not work; they are at the same time personal, because they reflect the taxpayer's personal judgment that work and residence should be separated. The law is clear that, when personal preference predominates, travel costs are deemed to be nondeductible personal expenses. *Commissioner v. Flowers*, 326 U.S. 465 (1946). The question in this case is whether a different rule should apply in the case of a married woman who can pursue a professional career in the field of her choice only by working a hundred miles from the home in which she lives with her husband.

The operating principle behind the travel-expense deduction was explained by the United States Tax Court in *Goodman v. Commissioner*, 30 T.C.M. (CCH) 1369, 1371 (1971):

> In the final analysis, the question is whether it would be reasonable in the circumstances of the particular case to expect the taxpayer to move his family to the new work location and establish his permanent residence in that area. If so, . . . the place of employment becomes his tax home . . . [and] the cost of his meals, lodging, and related items are not deductible under section 162(a)(2).

Accord, *Hantzis v. Commissioner*, 38 T.C.M. (CCH) 1169, 1171 (1979), *rev'd on other grounds*, 638 F.2d 248, (1st Cir. 1981); *Rosenspan v. United States*, 438 F.2d 905, 912 (2d Cir.), *cert. denied*, 404 U.S. 864 (1971). Consistent with this general principle, the Service allows workers who are temporarily reassigned to distant cities to deduct their travel expenses. Rev. Rul. 73-529, 1973-2 C.B. 37; Rev. Rul. 83-82, 1983-1 C.B. 45. The Service justifies its "temporary assignment" rules by making

the common-sense argument that it is unreasonable to expect a worker with a temporary job to go to the expense and aggravation of moving the household just to reduce travel-related costs.

The temporary assignment rules represent an *application* of the underlying "reasonableness of the move" principle, not a *substitute for* that principle. The temporary assignment rules apply to the discrete situation of a taxpayer with one job. The Feltons are in a different situation. They have two jobs, not one. Under the circumstances, it makes more sense to apply another standard of "reasonableness" routinely used by the Commissioner in the two-job context. That standard is the familiar "secondary or minor place of business" test used for the individual taxpayer who travels between two jobs. *See* Rev. Rul. 75-432, 1975-2 C.B. 60, 61. In the context of the two-worker household, the spouse who works at the secondary or minor place of business of the marital unit would be allowed to deduct travel expenses incurred while away from the marital home.

In essence, there is a fairly exact analogy between an individual taxpayer who performs two jobs and a husband and wife filing a joint income tax return who also realize income from two jobs and incur precisely the same kinds of employment-related travel expenses. The courts have developed standard criteria for distinguishing between an individual taxpayer's primary and secondary places of business; these same criteria could be applied usefully and productively in cases involving the primary and secondary workplaces of a two-worker household.[8]

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[8] In *Markey v. Comm'r*, 490 F.2d 1249, 1255 (6th Cir. 1974), for example, the court identified three objective criteria for determining which of two places of business constituted the taxpayer's primary workplace:

—The relative amount of time spent in each place;

[Continued]

There is no doubt in this case that Marianne Felton's job in New Albany, Indiana, was the family's secondary job. For ten years, her husband's job in Bloomington was the family's sole source of income. Even after Mrs. Felton secured employment in New Albany, the Feltons spent most of their work hours in Bloomington and earned most of their family income from work performed there. For reasons relating to Donald Felton's eligibility for retirement benefits, he could not give up his position in Bloomington and seek employment closer to New Albany. Separate jobs in the two cities were the best the family could do, given Mrs. Felton's desire to pursue a professional career of her own and Mr. Felton's professional and financial ties to the city in which the couple had long resided.

Under the circumstances, the Feltons could not reasonably have been expected to move to New Albany. Bloomington was the couple's "regular place of abode in a real and substantial sense," [9] and therefore should have been treated as their "home" as that term is used in Section 162(a)(2).

The decision of the court below, like the Service's position, is unfaithful to the policies served by the statute. The fault lies in the Service's unwillingness to acknowledge one of the great social and demographic transformations of our era. The two-worker household is now commonplace in the United States.[10] In the academic

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[8] [Continued]

—The relative amount of business activity conducted in each place; and

—The proportion of income derived from each place.

These same criteria could easily be applied when the husband works in one place and the wife works in another to determine which place should be deemed "home" for purposes of calculating deductible travel expenses.

[9] Rev. Rul. 73-529, 1973-2 C.B. 37, 38.

[10] Half of all American families contain two or more workers. U.S. BUR. OF THE CENSUS, MONEY INCOME OF FAMILIES AND PERSONS IN THE UNITED STATES: 1979, Table D (1981).

world in particular, and in other realms as well, spouses often travel to a regular business destination away from the marital home. Their reasons for doing so may bear no relationship to the reasons that prompt a worker who is temporarily reassigned to another location to maintain the same residence instead of moving; it is a mistake, legally and socially, to be guided in the former context by rules designed to fit the latter.

The Feltons' case calls for the application of traditional doctrine to a distinctly contemporary set of facts, a task that is one of the most important functions of this Court. Although Congress has addressed the problems of two-worker households in other contexts,[11] it has been silent on the ambiguity in Section 162(a)(2) of the Code despite invitations to fashion a legislative remedy.[12] We are confronted by one of those interstices in legislation that Justice Cardozo suggested should be filled by the courts.[13] The first step in filling the gap is to grant the writ of certiorari here.

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[11] *E.g.*, Internal Revenue Code of 1954, § 44A, 26 U.S.C. § 44A (Supp. V 1981) (child care expenses); *id.* § 221, 26 U.S.C. § 221 (Supp. V 1981) (marriage tax).

[12] *See Comm'r v. Stidger*, 386 U.S. 287, 296 (1967).

[13] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 68-69 (1921).

CONCLUSION

The writ should be granted, as it was in *United States v. Correll*, 389 U.S. 299, 301 (1967), "to resolve a conflict among the circuits on this recurring question of federal income tax administration."

Respectfully submitted,

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